Spring 2001

The Price of Vouchers for Religious Freedom

Laura S. Underkuffler
Cornell Law School, lu27@cornell.edu

The Price of Vouchers for Religious Freedom

LAURA S. UNDERKUFFLER*

I. INTRODUCTION

In *Pierce v. Society of Sisters,*[1] the Supreme Court held that a state's role in the education of its citizens must yield to the right of parents to provide an equivalent education for their children in a privately operated school – including a religious school – of the parents' choice. The question that underlies this colloquium is what the fundamental principles of *Pierce* may mean for pressing social and political issues in the twenty-first century. My particular task is to address how the principles of individual volition or individual choice, which *Pierce* represents, intersect - as a constitutional matter - with proposals to establish or extend public voucher programs to religiously affiliated elementary and secondary schools.

The importance of this question, in human terms, is something that I have personally experienced. While in college, I had the opportunity to teach a class of fifteen sixth-grade girls attending Presentation Elementary School, a Roman Catholic institution located in the near west side of Chicago. The experience was one that will stay with me for the rest of my life. The sheer ebullience and creative power of those girls, and their willingness to welcome me - a stranger from another world - into their midst, taught me more about the indomitability of the human spirit than any other single experience.

I also knew then, as I know now, that the availability of that school for those students was a life-altering and life-giving experience for them. All of the students whom I taught had failed in the public schools. It is therefore with a divided heart that I write of what I see as dangers in the use of public vouchers in religiously affiliated schools. I know that there are real children whose opportunities depend upon the resolution of this issue. However, I have concluded that the serious constitutional concerns that voucher programs raise are too important to be ignored, even if there is a difficult cost involved in the defense of those principles.

---

* Ms. Underkuffler is a Professor of Law at the Duke University School of Law.

1. 268 U.S. 510 (1925).

The availability of public moneys through voucher programs for religiously sponsored education seems, on the surface, to be a victory for freedom of conscience and individual choice. I have concluded, however, that the enactment of such programs—and their necessary approval by courts—would require that important constitutional principles regarding religious freedom be jeopardized. The upholding of voucher plans would be, one might say, a Pyrrhic victory for those who value freedom of conscience—if it is a victory at all. For in winning the right to channel public money in this way to religious schools, religious communities will, in the long run, serve forces that will undermine religious tolerance and the constitutionally protected place of freedom of conscience in our constitutional scheme.

Our country has a long history of political and legal opposition to the payment of public tax monies to religious institutions. In *Everson v. Board of Education*,[2] the Supreme Court set forth what has become the doctrinal baseline in this area. No state can, "consistently with the 'establishment of religion' clause of the First Amendment[,] contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church."[3] If a religiously affiliated elementary or secondary school is a "religious institution", in this sense, the use of public money for the general support of that school violates this entrenched Establishment Clause principle. For the use of voucher money by such schools to be upheld, the Court must take one of two avenues. It must either: 1) hold that the fact that individual parents choose the religious schools *breaks the causal connection* between the state program and the religious recipients, eliminating Establishment Clause concerns – a theory which I have called the "theory of the individual as causative agent;"[4] or 2) repudiate the idea that the payment of tax dollars to religious institutions for religious activities presents an Establishment Clause violation, in the belief that *neutrality* and *equal treatment* require that tax dollars be given to religious institutions, on a par with secular institutions, for their support.[5] It is my belief that neither choice serves the constitutional goal of the preservation of religious freedom.

---

2. 330 U.S. 1 (1947).

3. *Id.* at 16.

4. *See* Laura S. Underkuffler, *Vouchers and Beyond: The Individual as Causative Agent in Establishment Clause Jurisprudence*, 75 IND. L.J. 167 (2000).

5. This position has been advanced by some scholars. *See, e.g.*, Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 341 (1999).

II. PUBLIC AID TO RELIGIOUS SCHOOLS: DOCTRINAL CURRENTS

The tests that the Supreme Court has used to determine the constitutionality of state aid to religious elementary and secondary schools have remained, until quite recently, remarkably constant over the years. As the Court observed as recently as 1997, it has "continue[d] to ask whether the government acted with the purpose of advancing or inhibiting religion" and "whether the aid has the 'effect' of advancing or inhibiting religion."[6] It has also considered whether the program "result[s] in . . . an excessive entanglement" between church and state,[7] and whether, under the "endorsement" test, the state program "creates an impermissible 'symbolic link' between government and religion."[8]

The most important of these tests for school-aid cases has been whether the state-aid program has the impermissible effect of advancing religion. As a general rule, if the state program purchased equipment or services that were themselves secular in nature, and if the equipment or services conferred only incidental financial benefit upon religious schools, the program has been upheld. If, however, state money was used to purchase overtly religious goods or services, or if it provided substantial support to religious institutions, the program has been struck down as an "advancement" of religion under the Establishment Clause.

Following these guidelines, the Court has approved the spending of tax-raised funds to pay the bus fares of religious-school students as part of a general program that paid the fares of all students attending public and nonpublic schools.[9] It has also approved state programs that involved the lending of secular textbooks, the giving of standardized tests, and the provision of speech and hearing diagnostic services.[10] The Court reasoned that "[a]s with public provision of police and fire protection, sewage facilities, and streets and sidewalks, [such programs are] . . . of some value to the religious school, but . . . not such support of a religious institution as to be a prohibited establishment of religion within the meaning of the First Amendment."[11] Under such programs, primary financial benefit "is to parents and children, not to schools."[12] In addition, the funded

---

6. Agostini v. Felton, 521 U.S. 203, 222-23 (1997).

7. *Id.* at 232.

8. *Id.* at 224.

9. *See* Everson v. Board of Educ., 330 U.S. 1, 16-18 (1947).

10. *See* Wolman v. Walter, 433 U.S. 229, 239-40, 244 (1977) (plurality opinion) (standardized tests and scoring services, and speech and hearing diagnostic services), *overruled on other grounds by* Mitchell v. Helms, 120 S. Ct. 2530 (2000); Board of Educ. v. Allen, 392 U.S. 236, 242-48 (1968) (textbook loan program).

11. *Allen*, 392 U.S. at 242.

12. *Id.* at 244.

activities or materials – bus fares, secular textbooks, standardized tests, and so on – were, of themselves, of an entirely secular nature.

The giving of cash grants of state money to religious schools has been traditionally viewed by the Court as an entirely different matter. It is fair to say that the giving of *unrestricted* cash grants to religious elementary and secondary schools has been assumed by the Court for more than five decades to be an unconstitutional advancement of religion by government. If a religiously affiliated elementary or secondary school is a "pervasively sectarian" institution—if the school's secular educational function and its religious mission are "inextricably intertwined"[13] – then the use of public money for that school's general support has been viewed as the use of public money for religious purposes in violation of the Establishment Clause.[14] Although some scholars have speculated about the possible constitutionality of such grants if given to all schools, regardless of sectarian character, the Court's shifting majorities and pluralities have never—until the most recent school-aid case, discussed below—seriously considered this idea.[15] Indeed, many state-aid programs that involved *restricted* cash grants have been struck down over the years, on the ground that they could be "diverted" too easily by recipient institutions to religious purposes or activities.[16]

The core of the Court's objection to the giving of unrestricted cash grants to religious schools apparently has been the view that since such schools are religious institutions – since the education that they

13. Lemon v. Kurtzman, 403 U.S. 602, 657 (1971) (Brennan, J., concurring).

14. *See, e.g.*, School Dist. v. Ball, 473 U.S. 373, 395 (1985), *overruled on other grounds by* Agostini v. Felton, 521 U.S. 203 (1997); *Lemon*, 403 U.S. at 621; *Everson*, 330 U.S. at 15-16.

15. *See, e.g.*, Roemer v. Board of Pub. Works, 426 U.S. 736, 747 (1976) (opinion of Blackmun, J.) ("The State may not... pay for what is actually a religious education, even though it purports to be paying for a secular one, and even though it makes its aid available to secular and religious institutions alike.").

16. *See, e.g.*, Wolman v. Walter, 433 U.S. 229, 248-54 (1977) (invalidating state provision of movie projectors, tape recorders, and record players to religious schools, and the funding of field trips by religious school students, where the trips were chosen and conducted by religious school teachers), *overruled by* Mitchell v. Helms, 120 S. Ct. 2530 (2000); Meek v. Pittenger, 421 U.S. 349, 363-72 (1975) (invalidating the public provision of counseling, testing, speech and hearing therapy services, and instructional materials and equipment to religious schools), *overruled by Mitchell*, 120 S. Ct. at 2530; Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 774-80 (1973) (invalidating grants of state money to nonpublic schools for the maintenance and repair of school facilities and equipment); Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472, 479-82 (1973) (invalidating grants of state money to nonpublic schools for "reimbursement" of the costs of performing state-mandated testing, grading, and record-keeping tasks); *Lemon*, 403 U.S. at 615-620 (invalidating state program that reimbursed nonpublic schools for their expenditures for teachers' salaries, textbooks, and instructional materials in "secular" subjects).

offer is "subsumed in the religious mission,"[17] with religious practices and the propagation of faith as integral parts of their programs and curricula[18] – there is no functional way to distinguish the giving of cash grants to these schools and the giving of cash grants to churches, synagogues, and mosques. The fact that education in secular subjects goes on while the schools conduct religious activities and fulfill their religious missions has not, in the Court's view, sufficiently distinguished these religious institutions.

Vouchers are clearly unrestricted cash grants of state funds and —if given directly to religious schools—they would, without doubt, violate traditional Establishment Clause prohibitions. In an attempt to avoid this problem, advocates of vouchers have made two different but related arguments. First, they argue that the prohibition on unrestricted cash grants to religious institutions is inapplicable to voucher programs, because the decision to use voucher money for religious-school education is made by students or their parents, not by state authorities. Second, they argue, *even if* the money that reaches religious schools is deemed to be the result of state action, the substance of the Establishment Clause does not prohibit these payments. In their view, the Establishment Clause does not prohibit the "substantial" funding of religious institutions and activities, as the Supreme Court has traditionally held; rather, it only prohibits state favoritism for or against particular religious sects, or for or against religion generally. Since voucher programs give public money to religious and secular institutions on an evenhanded or "neutral" basis, they present no violation of the Establishment Clause.

---

17. Hunt v. McNair, 413 U.S. 734, 743 (1973).

18. *See Meek*, 421 U.S. at 366 ("The very purpose of [these schools] is to provide an integrated secular and religious education"); Walz v. Tax Comm'n of New York, 397 U.S. 664, 671 (1970) (such schools exist, in important part, to "assure future adherents to [the sponsoring religious organization's] particular faith. . ."). In one case, the Court cited the following as evidence of "pervasively sectarian character": that the schools "include[d] prayer and attendance at religious services as a part of their curricul[a], [were] . . . run by churches or other organizations whose members must subscribe to particular religious tenets, [had] . . . faculties and student bodies composed largely of adherents of the particular denomination, and [gave] . . . preference in attendance to children belonging to the denomination." *Ball*, 473 U.S. at 384 n.6. If a religiously affiliated school could sufficiently avoid these characteristics, it might be the permissible recipient of public funds, much in the way that religious hospitals and post-secondary schools are now. *See, e.g.*, Bowen v. Kendrick, 487 U.S. 589, 608-13 (1988) (upholding public funding of teenage counseling services offered by religious organizations); Tilton v. Richardson, 403 U.S. 672, 679-82 (1971) (plurality opinion) (upholding public funding of religious institutions of higher education); Bradfield v. Roberts, 175 U.S. 291, 298-99 (1899) (upholding public funding of religiously affiliated hospitals). Accomplishing such changes would, however, destroy the reason for being of most religious elementary and secondary schools.

The first theory – that independent, individual decision making may be the "causative agent" for Establishment Clause jurisprudence – has its roots in a series of cases decided by the Supreme Court from the mid-1980s to the present. Using this theory, the Supreme Court upheld a state program that permitted tax deductions for religious elementary and secondary school expenses;[19] upheld the use of state vocational assistance funds to pay for the costs of a college student's concededly religious training;[20] and upheld the use of federal funds to provide an interpreter for a deaf student enrolled in a religious high school.[21] The theory of these cases was that "public funds become available to sectarian schools 'only as a result of numerous private choices of individual[s] . . . ,' thus distinguishing [these programs from those] . . . involving 'the direct transmission of assistance from the State to the schools themselves.'"[22] As a result, any advancement of religion that resulted from these programs "cannot be attributed [in a constitutional sense] to state decision making."[23]

Whether this theory has potentially *dispositive* power - or whether it is simply used in conjunction with traditional Establishment Clause tests - has been unclear. For instance, in *Agostini v. Felton*,[24] decided in 1997, the Court upheld the sending of public school teachers into religious schools to provide remedial education under Title I of the Federal Elementary and Secondary Education Act. In the course of this opinion, the Court noted that services were provided to the student rather than to the school[25] – with the student's decision to attend a religious school being an independent one.[26] This discussion seemed to echo the Court's use of the theory of the individual as causative agent as it had appeared in prior cases. The importance of this theory was obscured, however, when the Court proceeded in *Agostini* to consider traditional Establishment Clause

19. *See* Mueller v. Allen, 463 U.S. 388, 399 (1983).

20. *See* Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 485-89 (1986).

21. *See* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 9-14 (1993).

22. *Id.* at 9 (quoting *Mueller*, 463 U.S. at 399).

23. *Zobrest*, 509 U.S. at 10. The theory of the individual as causative agent has appeared in the Court's opinions in other Establishment Clause contexts as well. *See, e.g.*, Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995) (upholding the payment of university-collected student-activity funds to a printing contractor who was independently retained by students to print religious materials); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995) (plurality opinion) (upholding the decision of a private group to place a cross on a state-owned square that was used for public speeches and other activities traditionally associated with public fora).

24. 521 U.S. 203 (1997).

25. *Id.* at 229.

26. *See id.* at 225-27.

concerns.[27] For instance, the Court cited as important—when upholding this aid—that it did not "supplant" services offered in the religious school;[28] that it created no "financial incentive to undertake religious indoctrination";[29] that it was, of itself, of a secular character;[30] and that its secular character could be ensured without excessive entanglement of church and state.[31]

Thus, after *Agostini*, the theory of the individual as causative agent seemed to be a part of the Court's Establishment Clause jurisprudence, but its role vis-à-vis traditional Establishment Clause concerns was unclear. In all of the cases in which this theory was used, it seemed to be something which simply reinforced the conclusion – derived from traditional Establishment Clause tests – that the state-aid program presented no real Establishment Clause dangers.

In a very recent case, however, a plurality of the Court indicated a potentially far more reaching role for this theory. *Mitchell v. Helms*,[32] decided last June, involved a challenge to a federal program under which computers and other technical materials and services were purchased with federal money by local school districts, and distributed as "loans" to all schools within the district's geographic boundaries – public, private, and parochial. Six justices voted to uphold the constitutionality of this program. Using a blended theory of "neutrality" and "private choice", the plurality held that the federal program in *Mitchell* posed no Establishment Clause problem. Under this program, the amount of aid that a school received was based on enrollment, and enrollment was determined by parental choice. This scheme used "'neutral, secular criteria'" for aid decisions that neither favored nor disfavored religion.[33] In addition, the aid that the program provided – computers, computing software, and library books – was "'secular, neutral, and nonideological'", and used in public schools.[34]

The result in *Mitchell* was not, of itself, a revolutionary one. Although in two old cases – *Meek v. Pittenger*[35] and *Wolman v. Walter*[36] – the Court had struck down the provision of otherwise secular instructional materials and equipment to religious schools, those

27. *Id.* at 229.
28. *Id.*
29. *Id.* at 231.
30. *See Agostini*, 521 U.S. at 223-28.
31. *See id.* at 232-35.
32. 120 S. Ct. 2530 (2000).
33. *Id.* at 2552 (quoting *Agostini*, 521 U.S. at 231).
34. *Id.* at 2537 (quoting 20 U.S.C.§ 7372(a) (1)).
35. 421 U.S. 349 (1975), *overruled by* Mitchell v. Helms, 120 S. Ct. 2530 (2000).
36. 433 U.S. 229 (1977), *overruled by* Mitchell, 120 S. Ct. at 2530.

cases were generally considered to be outliers by most commentators. The materials and equipment that were prohibited under *Meek* and *Wolman* seemed, to most observers, to be functionally indistinguishable from the materials and equipment that the Court had approved in other cases, such as secular textbooks provided to religious schools under textbook loan programs.[37] The federal program in *Mitchell* could have been upheld, and the *Meek* and *Wolman* cases overruled, using the Court's traditional Establishment Clause principles. In all of these cases, state programs purchased equipment and services which were – of themselves – secular in nature, and which conferred only incidental financial benefit upon religious schools.

What made the *Mitchell* opinion a radical break with the past was the way in which this result was reached. First, the terms in which the plurality discussed the theory of the individual as causative agent granted this theory well-nigh dispositive power. The role of individual choice in Establishment Clause jurisprudence was summarized by Justice Thomas in the following terms: "If aid to schools, even 'direct aid,' is neutrally available and, before reaching or benefiting any religious school, first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any 'support of religion.'"[38]

Indeed, this theory has dispositive power, in the plurality's view, because of the plurality's reduction of Establishment Clause concerns to a single principle: whether the government action can reasonably be said to involve "indoctrination" in religion generally or in a particular religious faith.[39] If the aid is "neutral" – if it is "offered to a broad range of groups or persons without regard to . . . religion" – then it is unreasonable to conclude that any indoctrination has been done at government behest.[40] And if private choices – rather than the single act of government – determine the identity of aid recipients, "a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment."[41] And granting special favors, a deviation from "neutrality," is *all* that the Establishment Clause prohibits.

What is important is what is missing from this approach. In particular, absent is any mention of the traditional requirement that the state aid provide only "incidental" benefit to religious schools.

---

37. *See, e.g.*, Board of Educ. v. Allen, 392 U.S. 236, 242-48 (1968).

38. *Mitchell*, 120 S. Ct. at 2544 (quoting Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 489 (1986)).

39. *See id.* at 2541-43.

40. *Id.* at 2541.

41. *Id.*

Under the plurality's approach, aid that is "neutral" and distributed in accordance with "private choice" would presumably be constitutional, even if it provided all, or nearly all, of a religious school's funding.

Voucher advocates have heralded the plurality opinion in *Mitchell* as proof that four Supreme Court justices, at least, are poised to remove the Establishment Clause barrier to the use of voucher money in religious schools. The enthusiasm that those who support vouchers feel after *Mitchell* may be premature. Justice Thomas carefully distinguished cash grants, citing the "'special Establishment Clause dangers'" that they have traditionally been believed to present.[42] There is no doubt, however, but that *Mitchell* adds momentum to the idea that "private choice" and "neutrality" should be powerful ideas - indeed, potentially dispositive ideas - in our interpretation of Establishment Clause guarantees.

How should we evaluate these ideas? Should they be the touchstones – the *exclusive* touchstones – for Establishment Clause analysis?

III. PRIVATE CHOICE AND NEUTRALITY: HIDDEN DANGERS FOR RELIGIOUS FREEDOM

A. *The Dispositive Power Of Private Choice*

If one believes that the direct payment of public money to religious institutions for religious purposes raises Establishment Clause concerns – the position that the Supreme Court has traditionally taken—then the idea of private choice is a possible way to distinguish voucher plans. Voucher plans, it is argued, are not school-aid programs in the traditional sense, but rather general welfare programs for students and their parents. If, as Justice Thomas observed, a state can issue a paycheck to one of its employees, knowing that the employee may direct the funds to a religious institution,[43] there seems to be little obvious reason why a state cannot give vouchers to parents or students, who can, in turn, use that money for religious education. In both cases, state funds are given to individuals who may direct those funds to religious activities and religious institutions. If individual decision making eliminates Establishment Clause issues in the first context, it is argued, it should do so equally in the latter.

42. *Id.* at 2546 (quoting Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 842 (1995)).

43. *See Mitchell*, 120 S. Ct. at 2545.

This theory – which I have called the "theory of the individual as causative agent"[44] – assumes that intervening individual decision-making breaks any constitutionally cognizable connection between the state action and the religious use. Under this theory, one simply looks to see if there is a private individual or entity whose actions or choices are responsible – in a causal sense – for the religious result. If there is, any constitutionally cognizable connection between the state's action and the religious result is eliminated.

Granting this theory dispositive power is, in many ways, a very attractive idea. It is clean, simple, and eliminates the need for much of the complicated line drawing that has plagued the Supreme Court's Establishment Clause jurisprudence. It also vindicates, in a powerful way, the ideals of parental autonomy and private choice.

Should we, however, view constitutionally cognizable connections between state actions and their ultimate results in such limited terms? Let us take, for instance, the establishment of a state program that lends textbooks to all students, including those who attend private, all-white academies. Let us further assume that the use of textbooks in such racially discriminatory schools is a result which the legislature has anticipated and which it has – through this program – explicitly or implicitly authorized. Does the intervening individual decision making in this case eliminate any constitutionally cognizable connection between the state act and the discriminatory result?

This question was presented in *Norwood v. Harrison*,[45] decided by the Supreme Court in 1973. In that case, the state argued that the use of the textbooks in racially discriminatory schools was not something for which the state was responsible, because the decision to attend such schools was a matter of private parental choice.[46] The Supreme Court rejected this argument.[47] The Court held that when the private conduct simply operates in an anticipated and authorized way as a part of a state sponsored plan, the private actions – and their results – may be fairly attributed to government.[48] Private parties cannot be used to both *implement and insulate* state policies and conduct. In the Court's words, "'a state may not induce, encourage or promote private persons to accomplish'" what it is—as a constitutional matter—forbidden to accomplish itself.[49]

---

44. *See* Underkuffler, *supra* note 4.

45. 413 U.S. 455 (1973).

46. *See id.* at 463-64 & n.7.

47. *Id.* at 465.

48. *Id.*

49. *Id.* (quoting Lee v. Macon County Bd. of Educ., 267 F. Supp. 458, 475-76 (M.D. Ala. 1967)).

The use of the theory of the individual as causative agent in Establishment Clause cases is, of course, quite different. In Establishment Clause cases, there is no question about the existence of state action since it is the government's funding action (or other action) that is, itself, the potentially unconstitutional act. However, the attempt to use individual decision making as a way to break the constitutionally cognizable connection between the state funding act and the ultimate use of those funds is the same in both cases. In the case of voucher plans, should this attempt succeed?

In my view, there is no convincing basis on which to distinguish voucher plans. The key in such cases is whether the individual choices that are made are *anticipated* and *authorized* by the state funding scheme. We must ask, in each case, whether the state retains an interest in the use of state funds beyond the individual decisional act. And, if it does, we must determine whether the individual decision making in question is something that furthers that interest in an anticipated and authorized way.

Voucher plans are established because of the vital public function – the education of children – which private schools perform. The use of public money in private religious schools is anticipated and authorized *because* of the schools' discharge of this function. The individual parental decisions made under voucher plans are not unrelated and unanticipated actions that break the connection between state payment and ultimate recipient; they are not cases in which an individual – such as a state employee, spending a paycheck—uses the money for something in which the state retains no interest. Rather, the individual parental decisions made pursuant to these plans are anticipated and authorized actions which *accomplish the goal*—the public funding of (private and public) education—*which the government has previously identified.*

If, therefore, the direct payment of tax moneys to religious elementary and secondary schools is something which the Constitution forbids, the fact that money is laundered through "private choice" under a state voucher plan does not, and should not, alter that unconstitutional result. We cannot, through this mechanism, avoid the more fundamental question that voucher plans present: whether such state funding – *in itself* – violates Establishment Clause guarantees.

B. The Principle Of Neutrality

The idea of government neutrality as an important part of Establishment Clause analysis is well established in Supreme Court jurisprudence. State neutrality - in the sense of equal treatment of all persons before the law, regardless of religious affiliation or identity - was one of the cardinal principles of reformers during the American

Founding Era[50] and is a bedrock principle today.[51] As the Court's opinion in *Everson* famously intoned, "[t]he 'establishment of religion' clause of the First Amendment means at least this: [n]either a state nor the federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."[52]

The critical issue is whether neutrality, in this sense, is *all* that the Establishment Clause requires. This is actually an old debate, which has gained momentum with the question of the use of voucher money in religious schools.[53] If our only concern is state neutrality—if our only concern is that government not endorse, reward, or otherwise favor institutions or citizens on the basis of religious (or nonreligious) identity or belief—then, it is argued, the Establishment Clause presents no obstacle to voucher plans. The core idea of vouchers is that money will be available to all students and to all schools. This fact, and the mechanism of parental choice, guarantee that vouchers will not involve endorsement or favoritism of any kind.

One might quibble with some of the factual premises of this argument. For instance, the fact that a voucher plan is neutral in form does not necessarily mean that it was neutral in intention, or that it will, in fact, be neutral in operation. One can certainly imagine cases in which a legislative intention to favor certain groups is so apparent, or under which certain groups are such disproportionate beneficiaries, that the presumption of neutrality that the plan's form generates is seriously undermined. However, most of the voucher plans now proposed will have the formal, intentional, and operational neutrality that this argument assumes;

---

50. *See* Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WM. & MARY L. REV. 837, 928-29, 947-49 (1995) (discussing historical record).

51. *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97, 104 (1968) ("The First Amendment mandates government neutrality between religion . . . and nonreligion."); School Dist. v. Schempp, 374 U.S. 203, 215 (1963) (holding that the Constitution requires "'absolute equality before the law, of all religious opinions and sects . . . .'").

52. Everson v. Board of Educ., 330 U.S. 1, 15 (1947).

53. For discussion of this debate, *see, e.g.*, JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES 15-16, 41-53, 97-159 (1995); Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1 (2000); Ira C. Lupu, *To Control Faction and Protect Liberty: A General Theory of the Religion Clauses*, 7 J. CONTEMP. L. ISSUES 357 (1996); William P. Marshall, *What Is the Matter with Equality?: An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 IND. L.J. 193 (2000); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311 (1986).

and it is those plans that we must use to consider the merits of this argument.

The idea of government neutrality (in this sense) as the sole and dispositive content for Establishment Clause guarantees seems, at first glance, to be a favorable outcome for religious freedom. Under this understanding, religious individuals and institutions suffer no disability as the result of their religious status; they are, in particular, the potentially equal beneficiaries of government tax-funded largesse. But is this really the positive development for religious freedom that is imagined?

This neutrality – or, more accurately, this *parity* – paradigm is, unfortunately, a two-edged sword. For what it gives to freedom of conscience and individual choice through eligibility of religious institutions for government largesse, it takes from these very same values in critical ways.

First, the Establishment Clause prohibition on the payment of tax money to religious institutions for religious activities has been grounded in the belief that forcing individuals to support the religious beliefs of others – through the power of taxation – involves a particularly difficult violation of conscience. The enmeshing of government and religious institutions in this way was one of the practices to which reformers in the American Founding Era most bitterly objected.[54] We can ignore this objection, and the prohibitions it involves, only if we believe that the particular violation of conscience that government funding presents is – for some reason – no longer true.

The idea that compelled taxpayer support of the religion of others presents no particular violation of conscience – that such compulsion inflames no particularly dangerous or divisive passions – might be plausible if the plan were to involve only the funding of mainstream religious groups. Most citizens in this country would probably not feel a tremendous violation of conscience if they were compelled, through taxation, to fund (for instance) mainstream Christian or Jewish religious institutions with which they feel familiar and culturally comfortable. Indeed, most voucher advocates, when asked about the operation of voucher plans, envision such institutions as the recipients of state funds.

However, voucher plans that are premised upon the principle of neutrality *cannot*, by their very nature, be limited to such schools. If neutrality is to govern the operation of these programs, then *all* religious institutions, no matter how unfamiliar or even abhorrent their views, must be the equal recipients of such funds. If we publicly fund parochial schools, Quaker schools, Jewish schools, and other

54. *See, e.g.*, Underkuffler-Freund, *supra* note 50, at 930-56.

mainstream institutions – actions which most citizens would, in all likelihood, find quite benign – then we must also fund the private religious schools that preach religious hatred, racial bigotry, the oppression of women, and other views. It is one thing to tolerate intolerance; it is another thing to fund it. The divisiveness that the compelled public funding of such schools would inevitably create would serve only to destroy the atmosphere of tolerance and freedom that we have, as a society, so carefully and deliberately constructed. Indeed, the fact that we even *consider* such schemes is a testament to the success of our two centuries of freedom from them.

In addition, the idea that compelled financial support of the religions of others involves no particular violations of conscience for those who must pay endangers religious freedom in another way. If one believes that religious issues pose no particular difficulties for freedom of conscience - if one believes that coerced funding of religion is no different from the coerced funding of social programs, or foreign policy, or other uses with which one disagrees - then the traditional disabilities under which religious institutions have labored are eliminated. But this advantage comes, for them, at a cost. For with the triumph of the neutrality or "parity" paradigm in Establishment Clause jurisprudence comes, inevitably, the triumph of the neutrality or "parity" paradigm in the Free Exercise context, as well.

The fundamental reason for the different treatment of religious and secular institutions, as reflected in traditional understandings of the Establishment Clause, is the belief that *religion is different*, and that religious institutions reflect that difference. We worry about the merger of religion and government – we worry about the endorsement of religion by government – we worry about the funding of religion by government – because of the *particular* value and resultant power that religion has in individual lives. The movement to a neutrality or "parity" paradigm in Establishment Clause jurisprudence is possible only if we shed this idea. To decide that religious institutions can be funded on a par with secular ones, we must decide, as an implicit matter, that religious institutions are no different from secular ones. To do this, we must first conclude that religion as a specially powerful—and a specially valuable—force in human lives is one to which we no longer subscribe.

If we take this step—if we reject the idea that religion or freedom of conscience has any special power or value which justifies the imposition of particular legal *prohibitions*—then we must also reject the idea that religion or freedom of conscience has any special power or value which justifies the extension of particular legal *protections*. The same special characteristics that justify special treatment in one context drive special treatment in the other. If

religion claims no special value or power, requiring its institutional separation from the processes of government, then it can likewise claim no special value or power, requiring its protection from ordinary political processes and ordinary laws. Indeed, we find that—with the advance of the neutrality or "parity" paradigm in Establishment Clause cases—has come its advance in the Free Exercise context, as well. In a recent doctrinal shift, the Supreme Court held that free exercise claims (as a class) will generally lose to public interests expressed as a part of "religiously neutral" state laws.[55] Some commentators have agreed, arguing that free exercise rights should not mean that religious exercise be privileged, but that it simply be treated with the same regard as citizens' other concerns.[56] The rise of neutrality or "parity" as the operative paradigm in this context was a marked departure from the Supreme Court's traditional approach, under which religious beliefs and practices were protected, absent a compelling state interest, from the operation of "otherwise neutral" state laws. This development should not, however, be an unanticipated one: if religion is not special in one context, there is no obvious reason why it should be in the other.

The issue of vouchers has, unfortunately and paradoxically, raised an issue that has tremendous implications for our understanding of First Amendment guarantees. We must grapple with whether, as a fundamental matter, religion or freedom of conscience is a uniquely powerful force in human life and law. We must ask whether the *special power* which we ascribe to religion – and which is the basis for both constitutional protections and prohibitions – is empirically true and legally justified. Does religion have unique power, such that compelled taxpayer funding of religious activities and religious institutions is somehow more opprobrious, and more dangerous, than the funding of other activities and institutions? Does religion have unique power, such that protection of its practice, and its institutions, is uniquely justified? These are the questions that the neutrality or "parity" paradigm, in all of its facets, presents. And so—for all of the gains that this idea might yield for choice and freedom of conscience, in some ways—we must ask whether it is worth the cost.

---

55. *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) and Employment Div. v. Smith, 494 U.S. 872 (1990) (holding that if a state law simply precludes religious conduct, that – in the absence of evidence of intent to discriminate against the religious – creates no cognizable claim under the First Amendment's Free Exercise Clause).

56. *See, e.g.*, Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1283 (1994).

IV. CONCLUSION

On its face, the idea of the constitutionality of the use of voucher money in religious schools seems to be a victory for religious freedom. However, it is, in the end, a Trojan horse. For while proclaiming the cause of religious freedom, it necessarily carries – through the destruction of religious tolerance, and the denial of religion's special power – forces that will undermine that very freedom, within it.